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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION

Viacom International Inc., *et al.*,

Plaintiffs,

v.

YouTube, Inc. *et al.*,

Defendants.

Case No. 08-MC-80211-JF-PVT

**RESPONSE OF NONPARTY BAYTSP  
 TO DEFENDANT YOUTUBE'S  
 MOTION TO COMPEL  
 PRODUCTION OF DOCUMENTS**

The Football Association Premier League Limited, *et al.*,

Plaintiffs,

v.

YouTube, Inc. *et al.*,

Defendants.

Date: December 9, 2008  
 Time: 10:00 a.m.  
 Dept.: Courtroom 5, 4th Floor  
 Judge: Patricia V. Trumbull

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1 Pursuant to the Federal Rules of Civil Procedure and Local Rules of the United  
2 States District Court for the Northern District of California, San Jose Division,  
3 BayTSP.com, Inc. (“BayTSP”) hereby opposes the Motion to Compel Production of  
4 Documents Pursuant to Subpoena Duces Tecum filed on October 20 by YouTube, Inc. *et*  
5 *al.* (“YouTube”) and requests that the motion be denied.

6 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION**

7 YouTube attempts to create a dispute where none exists. BayTSP has not refused  
8 to produce documents, and, has worked diligently toward production of the documents  
9 the parties agreed BayTSP would produce, namely documents relating to the plaintiffs in  
10 the two litigations and “related parties.” In fact, as of the date of the hearing, December  
11 9, it is anticipated that YouTube will have had tens of thousands of documents available  
12 for review. While, YouTube, for some reason tries to make out a case for intentional  
13 delay, the fact of the matter is that YouTube’s subpoena, which literally calls for every  
14 document at BayTSP, even when limited to communications with the plaintiffs and  
15 related parties, includes hundreds of thousands of documents.

16 As explained below, and as YouTube already knows, BayTSP collected over four  
17 terabytes of data. After limiting and processing the data, BayTSP then developed a list of  
18 search terms and used those terms to “filter” the collected data in an effort to identify a  
19 subset of potentially responsive documents. Unfortunately, due to the large number of  
20 terms and the commonality of some of the terms, well over a million documents passed  
21 through the electronic filter. Assuming that each document averaged about five pages,  
22 that volume of documents amounts to over five million pages of documents. Prior to  
23 production, even with Agreements regarding inadvertent disclosure, BayTSP, and now  
24 Viacom, was and is, obligated to review the documents for privilege, personal and other  
25 wholly-unrelated documents. Even taking only two minutes per document to review, it  
26 would have taken over 33,000 hours, or 1300 days or 3.5 person-years to review. To  
27 facilitate this review, BayTSP developed an electronic search strategy. As it is, BayTSP  
28 still spent over 1900 hours in the last six months searching and reviewing those million

1 plus documents and have narrowed the number of potentially responsive documents to  
2 approximately 650,000 or half.

3 As BayTSP has told YouTube, the documents are currently being reviewed by  
4 Viacom for privilege and work product information. BayTSP understands from Viacom  
5 that it expects to be able to begin releasing documents on a rolling basis for YouTube's  
6 review on November 21.

7 As the record indicates, while it has taken time to process the huge amount of data  
8 involved, BayTSP has tried to keep YouTube informed and also tried to solicit its help in  
9 getting the documents produced in a timely fashion.

10 When considering this matter, the Court is urged to look behind YouTube's  
11 curtain of hyperbole, accusations, and sensational arguments to the facts. BayTSP has  
12 tried to do that and does not waste the Court's time arguing the facts or the law related to  
13 the DMCA.

## 14 I. FACTUAL BACKGROUND

### 15 A. YouTube's Overly-Broad Subpoena to Nonparty BayTSP

16 BayTSP is a nonparty to this litigation. One need only look to the pleadings for  
17 evidence of BayTSP's procedural remoteness from this suit. BayTSP is neither a plaintiff  
18 nor defendant in this action (Declaration of Brandon Baum ("Baum Decl."), D.I. 2, ¶6;  
19 Ex. C). In fact, BayTSP's involvement in this suit was brought on by YouTube's own  
20 subpoena to BayTSP (Baum Decl., ¶4; Ex. A). YouTube's third-party subpoena  
21 inherently recognizes BayTSP's status as a nonparty (*id.*). YouTube's assertion,  
22 therefore, that BayTSP "effectively did volunteer to participate in this litigation" (Mot. at  
23 14:12) is without merit. The mere fact that Viacom hired BayTSP to search for and  
24 identify infringing material posted to YouTube's website, does not make BayTSP a party.  
25 BayTSP stands to gain nothing from this suit and has not been accused of any  
26 wrongdoing. As set forth below, nonparty BayTSP is to be protected from undue  
27 hardship imposed by unreasonable subpoenas. *See* Section II.A. *infra*.

28 YouTube's claims notwithstanding, BayTSP, a third party to this litigation, has

1 never refused to produce its documents relevant to Viacom's litigation with YouTube.  
2 This was explained in the first substantive teleconference with YouTube on November  
3 27, 2007. To the contrary, BayTSP has expended significant effort to gather, process,  
4 and review a vast number of responsive documents. BayTSP has further made YouTube  
5 aware of these continued efforts by engaging in numerous good faith conversations  
6 informing YouTube of BayTSP's progress, as set forth below.

7 YouTube's subpoena, however, seeks far more than this limited set of documents.  
8 The original scope of YouTube's subpoena seeks an unreasonable and irrelevant set of  
9 documents. For instance, several requests seek all documents and communications  
10 concerning monitoring, searching or screening of YouTube, regardless of whether these  
11 documents are related to Viacom and the instant suit (Baum Decl., ¶4, Ex. A (Doc.  
12 Requests 1, 3, 5, 7, 8, 12, and 13)). Additional requests fish for all software (and all  
13 documents related to the nature, use, development, training, user documents, interface  
14 design, and interfaces of that software) that BayTSP uses to identify or monitor  
15 copyrighted works (*id.* (Doc. Request 2, 8, and 10)). This expansive request taken at face  
16 value would encompass, among other things, all software used to generate email, access  
17 the internet, create spreadsheets, etc. Still other requests seek all documents related to the  
18 training of employees to search for or monitor websites, which would include among  
19 myriad other irrelevant documents, all scheduling emails and memoranda (*id.* (Doc.  
20 Requests 3 and 7)). None of these are relevant to the dispute of whether YouTube has  
21 violated the copyright laws. In particular documents related to BayTSP's clients other  
22 than the plaintiffs is wholly irrelevant and would result in substantial harm to BayTSP's  
23 business if it was required to involve other third parties in the dispute between Viacom  
24 and YouTube. It is for this very reason that BayTSP and YouTube agreed to exclude  
25 them from the present production.

26 Faced with YouTube's overly-broad requests, BayTSP chose to work in good  
27 faith with YouTube to reasonably limit its subpoena, rather than refuse to produce  
28 documents as YouTube now claims in its motion. The facts belie YouTube's assertion

1 that BayTSP has refused to produce documents.

2 **B. Negotiations Regarding the Unreasonable Scope of YouTube's Subpoena**

3 YouTube and BayTSP spent many months negotiating the scope of BayTSP's  
4 response to YouTube's September 27, 2007 subpoena. These negotiations began with  
5 BayTSP's timely November 7 objections to the overly broad and unduly burdensome  
6 scope of YouTube's subpoena (Baum Decl., ¶5; Ex. B; *see also* Declaration of Steven D.  
7 Hemminger ("Hemminger Decl."), ¶2; Ex. A). Counsel for BayTSP spent over three  
8 months discussing the scope of the subpoena with attorneys from YouTube's original  
9 counsel, Bartlit Beck Herman Palenchar & Scott LLP (Baum Decl., ¶17; Ex. N).

10 Negotiations that neither Mr. Baum nor his firm were involved in.

11 BayTSP conducted its initial telephonic meet and confer with YouTube's counsel  
12 on November 27, 2007 (Hemminger Decl., ¶3; Ex. B). During this call, BayTSP's  
13 counsel emphasized the need to identify all plaintiffs regarding which BayTSP will  
14 produce responsive information prior to commencing the process of collecting documents  
15 (*id.* at ¶4). This is because, as BayTSP's counsel explained, BayTSP does not store each  
16 client's information in a separate database such that it would be simple to extract data  
17 relating to any particular client (*id.* at ¶5). YouTube's counsel agreed to seek  
18 clarification from YouTube on: (i) the breadth of the requests; (ii) the relevance of the  
19 information sought; (iii) whether YouTube agrees to limit the requests to include  
20 information relating to the named plaintiffs; and (iv) whether YouTube is seeking  
21 production of the BayTSP's source code (*id.* at ¶6). Similarly, BayTSP's counsel agreed  
22 to consult with BayTSP regarding the following outstanding issues: (i) whether BayTSP  
23 would agree to a piecemeal production despite the burden; and (ii) whether BayTSP  
24 would agree to produce design specifications, user manuals, marketing materials and  
25 other such information discussing BayTSP's software (*id.* at ¶7).

26 During their subsequent December 4 telephonic meet and confer, counsel for  
27 BayTSP and counsel for YouTube continued the discussion regarding BayTSP's response  
28 to YouTube's subpoena (*id.* at ¶8). BayTSP's counsel explained that although BayTSP

1 does not believe the requests are proper because they are overbroad, it would like to reach  
2 agreement regarding the scope of the requests and produce relevant documents (*id.* at ¶9).  
3 The discussion then progressed to BayTSP’s concerns that the document requests, as  
4 written, seek information relating to each of BayTSP’s clients and potential clients (*id.* at  
5 ¶10). Counsel for YouTube raised for the first time the issue of whether BayTSP will  
6 agree to produce documents relating to Viacom’s subsidiaries (*id.* at ¶11). As the  
7 subpoena did not define the term “Viacom,” BayTSP’s counsel agreed to consult with  
8 BayTSP regarding this issue and YouTube’s counsel agreed to provide BayTSP with a  
9 list of Viacom’s subsidiaries (*id.* at ¶12; *see also id.*, ¶13; Ex. C).

10         YouTube’s counsel continued the December 4 meet and confer by communicating  
11 YouTube’s proposal to limit the requests to seek information relating to BayTSP’s ten  
12 biggest clients (in addition to documents relating to the named plaintiffs), including  
13 documents concerning the effectiveness of BayTSP’s searching mechanism, the rules  
14 provided by the clients to BayTSP to guide BayTSP’s search for infringing uses, and the  
15 process for sending takedown notices to YouTube (*id.* at ¶14). BayTSP’s counsel  
16 identified several problems with YouTube’s proposal including the substantial burden on  
17 BayTSP and likely chilling effect on BayTSP’s business (*id.* at ¶15). Counsel explained  
18 that BayTSP’s documents are subject to confidentiality agreements (*id.* at ¶16). A  
19 copyright owner may opt not to hire BayTSP for fear of exposure to the following risks:  
20 (1) the production of the copyright owner’s confidential information to YouTube; and/or  
21 (2) YouTube’s issuance of a subpoena to the copyright owner (*id.* at ¶17). Further,  
22 BayTSP’s counsel stated that it is not clear how the information regarding these ten  
23 clients is relevant to Viacom’s claims (*id.* at ¶18). Finally, with regard to the types of  
24 documents YouTube sought, BayTSP stated it does not necessarily maintain tallies of all  
25 of the takedown notices it sends on behalf of each client nor does BayTSP maintain  
26 documents concerning its effectiveness in identifying infringement (*id.* at ¶19). Counsel  
27 for YouTube agreed to consult with YouTube in order to narrow its requests in light of  
28 the foregoing concerns (*id.* at ¶20).

1 Counsel for YouTube and BayTSP next met and conferred via telephone on  
2 December 18 (*id.* at ¶21). BayTSP proposed that the parties agree to limit the subpoena  
3 to seek information relating to the named plaintiffs and that BayTSP's production of this  
4 information would constitute initial compliance with the subpoena. (*id.* at ¶22).  
5 YouTube's counsel agreed that this proposal makes sense, but noted that counsel did not  
6 have the authority to agree and would have to confer with YouTube (*id.* at ¶23).  
7 Regarding the production of information relating to BayTSP's clients other than the  
8 named plaintiffs, BayTSP stated its concern that the production of information relating to  
9 its clients will drag them into the lawsuit and have a chilling effect on BayTSP's business  
10 (*id.* at ¶24). Moreover, BayTSP failed to understand the relevance of the names of its  
11 clients (*id.* at ¶25). Thus, BayTSP objected to the production of this information on the  
12 grounds of relevance, confidentiality and burden (*id.* at ¶26). With regard to the  
13 production of information relating to the named plaintiffs, BayTSP's counsel represented  
14 that BayTSP would contact each named plaintiff that is a client of BayTSP regarding the  
15 production of the client's information in response to YouTube's subpoena (*id.* at ¶27). If  
16 the client did not object to the production of its information, BayTSP would produce it  
17 and Bay TSP would not object to the production of documents relating to any of these  
18 clients unless the client objected (*id.* at ¶28). BayTSP must follow this procedure,  
19 BayTSP's counsel stated, because its agreements with its clients provided that BayTSP  
20 may neither disclose that a particular entity is a client nor disclose that client's  
21 information without notifying the client and providing the client with the opportunity to  
22 object (*id.* at ¶29). BayTSP waited to hear back from YouTube on the outstanding  
23 proposals.

24 On January 2, 2008, more than two months after BayTSP's objected to  
25 YouTube's subpoena, counsel for BayTSP were informed that Mayer Brown LLP would  
26 replace Bartlit Beck Herman Palenchar & Scott LLP as counsel for YouTube in this  
27 matter (*id.* at ¶30; Ex. D).

28 BayTSP's counsel repeated its proposal to YouTube's new counsel on January 7,

1 namely that YouTube limit its excessive requests for documents to include only Plaintiffs  
2 and their subsidiaries and exclude BayTSP's proprietary software and nonparty clients  
3 (*id.* at ¶31). YouTube's new counsel agreed to speak to YouTube regarding whether it  
4 was willing to accept the following proposal by BayTSP: (1) YouTube would limit its  
5 subpoena to seek information relating to the named plaintiffs only; (2) YouTube would  
6 agree that BayTSP need not produce its source code; and (3) BayTSP would agree that it  
7 will not to object to the issuance of a second YouTube subpoena seeking this information  
8 at a later date on the basis of that it the issuance of second subpoena is unduly  
9 burdensome. (*id.* at ¶32).

10 On January 18, YouTube's counsel accepted BayTSP's limiting proposal (*id.* at  
11 ¶33; Ex. E). During a telephonic meet and confer on January 30, however, BayTSP's  
12 counsel clarified that the January 18 letter from YouTube's counsel did not accurately  
13 reflect BayTSP's proposal (*id.* at ¶34). BayTSP proposed that the parties agree to limit  
14 the subpoena to seek documents specific to the named Plaintiffs only and to exclude  
15 production of BayTSP's source code (*id.* at ¶35). BayTSP further proposed that its  
16 response to the subpoena would constitute full compliance with the subpoena without  
17 prejudice to YouTube's right to issue a subsequent subpoena seeking the production of  
18 additional information (*id.* at ¶36). Although counsel for YouTube expressed concern  
19 that it would have no recourse should BayTSP produce very few responsive documents,  
20 BayTSP's counsel alleviated this concern by stating that BayTSP would produce all  
21 responsive documents subject to these limitations and that YouTube could later issue a  
22 second subpoena seeking the production of the excluded categories of documents (*id.* at  
23 ¶37). Counsel for YouTube agreed and requested that BayTSP's counsel memorialize in  
24 writing the parties' agreement to the above terms as stated on January 30, 2008 (*id.* at  
25 ¶38). BayTSP's counsel submitted a written summary of the parties' agreement for  
26 execution on February 13, 2008 (*id.* at ¶39; Ex. F).

27 Continuing their January 30 meet and confer, counsel for both YouTube and  
28 BayTSP agreed to further limit YouTube's request to exclude the following: the history

1 of BayTSP's software development, any development contributions made by entities  
2 other than named Plaintiffs (with the exception of development documents showing  
3 design specifications of the technology), and API's that do not belong to BayTSP (which  
4 counsel represented it believed BayTSP did not have) (*id.* at ¶40). BayTSP then  
5 informed YouTube's counsel that takedown notices sent by BayTSP on behalf of its  
6 clients did not exist at BayTSP in any documentary form (*id.* at ¶41). Rather, the  
7 information contained in the takedown notices existed in a proprietary database such that  
8 they can be created, but to create the takedown notices would require creation of a script  
9 and processing on the current and archived databases (*id.* at ¶42). The entire process,  
10 BayTSP's counsel stated, would be extremely burdensome and time consuming (*id.* at  
11 ¶43). Moreover, BayTSP reminded YouTube's counsel that YouTube has a copy of the  
12 takedown notices and stated that it was unclear why these takedown notices were critical  
13 to YouTube's case (*id.* at ¶44). BayTSP's counsel declined to produce the entire  
14 database because it contains proprietary information that would need to be redacted by  
15 BayTSP employees, preventing them from attending to their ordinary business (*id.* at  
16 ¶45). YouTube's counsel stated YouTube would consider reimbursing BayTSP for the  
17 expense of redaction and BayTSP's counsel agreed to discuss with BayTSP the effort  
18 required to retrieve the takedown notices (*id.* at ¶46). Thus as of February, 2008 the  
19 parties had not yet finalized their discussions.

20       On February 15, shortly after agreeing to BayTSP's proposal and in response to  
21 BayTSP's February 13 writing commemorating the same, YouTube sought expansion of  
22 the negotiated subpoena's scope to "Viacom-related entities," rather than simply Viacom  
23 subsidiaries, but refused to clarify the meaning of this phrase (Baum Decl., ¶17; Ex. N;  
24 *see also* Hemminger Decl., ¶47; Ex. G). To clarify the term and move forward with  
25 production, BayTSP provided on February 20 a list of more than 470 entities that it  
26 understood to be "Viacom-related entities" (Hemminger Decl., ¶48; Ex. H).  
27 Notwithstanding YouTube's complaints that receipt of the documents was "critical"  
28 YouTube delayed substantively responding to BayTSP's attempt at clarification for *over*

1 *two months* (Baum Decl., ¶17; Ex. N).

2       In the meantime, given BayTSP's desire to move forward with document  
3 collection in light of the agreed upon subpoena scope, counsel for BayTSP stated via its  
4 March 24 letter to YouTube's counsel, that BayTSP would collect documents pursuant to  
5 the agreement, specifically omitting (i) documents related to BayTSP clients not named  
6 as plaintiffs and not included on the February 20 list of Viacom-related entities, and (ii)  
7 BayTSP's source code, firm ware, computer programs and algorithms (Hemminger Decl.,  
8 ¶49; Ex. I). In response to YouTube's March 26 concerns, BayTSP recounted the  
9 January 30 agreement in a letter dated March 28 and, in the interest of moving production  
10 document collection forward, requested provide by April 5 an alternate list of Viacom  
11 entities to BayTSP's February 20 list (*id* at ¶50; Ex. J). BayTSP also elicited a response  
12 regarding the stalled decisions of takedown notices, which had been left to YouTube to  
13 determine whether it would compensate BayTSP for the expense of obtaining these (*id*).  
14 On April 2, nearly five months after receiving BayTSP's objections to its subpoena  
15 (including two months of silence), YouTube finally identified the entities it thought were  
16 relevant, a list of more than 470 entities (*id* at ¶51; Ex. K).

17 **C. Negotiations Regarding the Use of Comprehensive Search Terms**

18       While negotiating the final scope of YouTube's subpoena, BayTSP entered into  
19 discussions with and obtained an e-discovery vendor (Baum Decl., ¶17; Ex. N). BayTSP  
20 then identified and collected *over four terabytes* of data (*id.*). This excessive volume of  
21 data made clear to BayTSP that targeted searches would be necessary to identify and then  
22 review documents responsive to the narrowed scope of YouTube's subpoena  
23 (Hemminger Decl., ¶52). On April 23, BayTSP's counsel informed YouTube that  
24 BayTSP had completed its document collection and was in the process of developing a  
25 search term list (*id.*, ¶53; Ex. L).

26       On May 2, BayTSP solicited from YouTube a list of relevant search terms (*id.*,  
27 ¶54; Ex. M). After receiving in response a request that BayTSP itself provide a list of  
28 search terms, BayTSP generated such a list, provided it to YouTube, and sought

1 meaningful input from YouTube (*id.*, ¶¶55-6; Exs. N-O). Unfortunately, on May 21,  
2 YouTube again refused to provide BayTSP with search terms and instead provided only  
3 vague suggestions (*see id.*, ¶57; Ex. P). On May 28, BayTSP utilized YouTube's  
4 suggestions to generate additional search terms and then again solicited terms from  
5 YouTube, requesting this information by May 30 (*id.*). In response to its latest overture,  
6 BayTSP received from YouTube an objection to the adequacy of electronic searching  
7 generally (*id.*, ¶59; Ex. R). Confronted with YouTube's unreasonable unwillingness to  
8 assist in the determination of searches commensurate with the negotiated scope of  
9 YouTube's subpoena, BayTSP informed YouTube on May 30 that its search list of nearly  
10 1,000 terms was being finalized (*see id.*, ¶60; Ex. S).

11 YouTube's counsel, on May 30, attempted to renege on the agreed upon limited  
12 scope of its subpoena (*id.*, ¶61; Ex. T). BayTSP's counsel reminded YouTube in its June  
13 2 response that, as discussed, BayTSP intended to use the search term list to retrieve  
14 properly requested documents (*id.*, ¶62; Ex. U). On June 10, BayTSP informed YouTube  
15 that its search term list was now complete and that BayTSP's document vendor indicated  
16 filtering the data collected would require approximately one month (Baum Decl., ¶17;  
17 Ex. N). In addition to that time, BayTSP stated that production of documents to  
18 YouTube would not be possible without additional time for review of privilege and  
19 responsiveness (*id.*). Finally, BayTSP offered to meet with YouTube at the end of June or  
20 early July in order to better project a timeline for production after filtering the collected  
21 data (*id.*).

22 YouTube did not contact BayTSP again until late August.

23 **D. YouTube's Already Has or Should Have the Majority of Documents it is**  
24 **Complaining About**

25 The vast majority of the documents that YouTube complains about it already has  
26 or could get through discovery from plaintiffs. For example, it already has copies of all  
27 of the takedown notices that BayTSP has sent. Not only on behalf of the plaintiffs but  
28 every other client that BayTSP has that had copyrighted material posted on YouTube.

1 Also, YouTube should have copies of all of the communications between BayTSP and  
2 the plaintiffs. Given the stated need for this information, it is beyond belief that  
3 YouTube has not requested those communications from Viacom. Thus, the vast majority  
4 if not all of the communications with plaintiffs are already in YouTube's possession.

5 YouTube's motion references complaints from three or four people who received  
6 take down notices that they contend were improper.<sup>1</sup> First, these communications are  
7 between YouTube and the posters. Thus, these are not the types of communications that  
8 would come from BayTSP. In any event, BayTSP has agreed to produce such documents  
9 as they relate to the plaintiffs should any exist.

10 As such YouTube's complaints about the criticality of the documents and the  
11 delay in getting them ring hollow.

12 **E. BayTSP's Efforts to Produce Documents Under the Negotiated Scope of**  
13 **YouTube's Subpoena**

14 Since completing the five month negotiations of subpoena scope and two months  
15 of search term discussions with YouTube, BayTSP has expended significant effort to  
16 gather, process, and review a vast amount of potentially responsive documents. In its  
17 August 21 email to YouTube's counsel, BayTSP's counsel informed YouTube that  
18 processing and review of the documents has taken much longer than anticipated (Baum  
19 Decl. Ex. O). Nevertheless, at least seventeen attorneys and staff members have worked  
20 for months reviewing documents for privilege and responsiveness and preparing  
21 documents for production (Hemminger Decl., ¶63). Collectively, these attorneys and  
22 staff have spent over 1900 hours preparing documents for production to YouTube (*id.*,  
23 ¶64). In addition, BayTSP's internal employees have invested substantial amounts of  
24 time and resources in identifying documents and assisting with their collection (*id.*, ¶65).

25 Ultimately, more than 1.35 million documents were electronically processed and

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26  
27 <sup>1</sup> Interestingly YouTube only received complaints from less than a half a dozen people  
28 from among the of the hundreds of thousands of take down notices that were sent.

1 loaded into a database for review (*id.*, ¶66). As of the time of this response, BayTSP has  
2 identified approximately 650,000, believed to be non-privileged documents for  
3 production to YouTube (*id.*, ¶¶67-70; Exs. V-Y). BayTSP’s counsel has repeatedly  
4 represented to YouTube that responsive documents will be made available on a rolling  
5 basis beginning November 21,<sup>2</sup> thereby obviating any alleged need for this motion (*id.*).  
6 As of the time of filing this response, YouTube has refused to withdraw this motion (*id.*).

## 7 **II. ARGUMENT**

### 8 **A. YouTube’s Subpoena Imposes Undue Hardship on BayTSP**

9 It is well-settled that under Rule 45(c)(1) of the Federal Rules of Civil Procedure  
10 third parties, like BayTSP, are to be protected from undue hardship imposed by  
11 unreasonable subpoenas. Indeed, YouTube concedes the presence of Rule 45 concerns  
12 created by its subpoena (Mot. at 14:10).

13 Discovery is monitored and regulated because it is often used, as in this case, to  
14 harass and burden parties. *Highfields Capital Mgmt., L.P. v. Doe*, No. C0400176, 2005  
15 U.S. Dist. LEXIS 29680, at \*7 (N.D. Cal. May 31, 2005) (noting that one of the most  
16 common abuses under Rule 45(c) is the “casting an indefensibly wide net, or of seeking  
17 information from a non-party”). Undue burden to a nonparty is evaluated under both  
18 Federal Rule of Civil Procedure 26 and 45. *See Exxon Shipping Co. v. U.S. Dep’t. of*  
19 *Interior.*, 34 F.3d 774, 779 (9th Cir. 1994).

20 By issuing its overly-broad subpoena, YouTube fails to “take reasonable steps to  
21 avoid imposing undue burden or expense on a person subject to the subpoena.” Fed. R.  
22 Civ. P. 45(c)(1) . The Court is particularly concerned anytime enforcement of a

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23  
24 <sup>2</sup> While BayTSP and YouTube had spent a good deal of time negotiating the scope of the  
25 documents to produce, it had understood that there were no outstanding issues and had  
26 heard nothing from YouTube for two months prior to its surprise filing of this motion.  
27 Thus, BayTSP does not feel that the spirit behind the meet and confer requirements was  
28 met with regard to the filing of this motion and had YouTube inquired when the  
document would be available before filing the motion, it would have learned that they  
were being reviewed by Viacom and available in November.

1 subpoena imposes an economic burden on a nonparty. *Gonzales v. Google, Inc.*, 234  
2 F.R.D. 674, 680 (N.D. Cal. 2006); *see Compaq Computer Corp. v. Packard Bell*  
3 *Electronics, Inc.*, 163 F.R.D. 329 (N.D. Cal. 1995) *citing United States v. Columbia*  
4 *Broadcasting System, Inc.*, 666 F.2d 364, 371 (9th Cir. 1982); *Katz v. Batavia Marine &*  
5 *Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993) (noting nonparty status is a  
6 significant factor in weighing the burdens imposed by the discovery requests); *see also*  
7 *EEOC v. McCormick & Schmick's*, 2007 U.S. Dist. LEXIS 38049 \*18 (N.D. Cal. May  
8 15, 2007) (stating compliance with a subpoena is excused if “compliance threatens to  
9 unduly disrupt or seriously hinder normal operations of a business.”).

10         A burden is undue when it is not justified by an offsetting benefit to the  
11 administration of justice, where compliance is unlikely to yield relevant evidence, as  
12 illustrated by the Advisory Committee Notes to the 1991 amendments to Rule 45(c) .  
13 Thus, the court balances the relevance of the discovery sought, the requested party’s  
14 need, and the potential hardship to the party subject to the subpoena. *Gonzales*, 234  
15 F.R.D. at 680. BayTSP’s nonparty status entitles it to considerations of the damage that  
16 could be done to its business by requiring production of documents of parties unrelated to  
17 the litigation. How and when a third party engages BayTSP to monitor the web to protect  
18 their rights under the Copyright Laws is wholly irrelevant to the issues in the case.  
19 Indeed, since YouTube is fully aware of the chilling effect its request for such material  
20 from third parties like BayTSP would have on copyright holders in hiring people to  
21 police its copyrighted works, it can only be inferred that it is employing this tactic to  
22 convince copyright owners not to hire companies like BayTSP.

23         Applying these precedents, YouTube’s subpoena imposes undue burden on  
24 BayTSP. Contrary to YouTube’s assertions, BayTSP has not refused to produce  
25 responsive documents. Rather, BayTSP has furthered the discovery process by  
26 negotiating the scope and formulating search term lists to render relevant documents.  
27 YouTube, in violation of Fed. R. Civ. P. 45(c)(1), has not taken reasonable steps to avoid  
28 imposing an undue burden upon BayTSP and has not allowed reasonable time for

1 compliance considering the depth and vagueness of YouTube's requests. Thus, the  
2 original scope of YouTube's subpoena runs afoul of the case law protecting nonparty  
3 BayTSP from overly-board demands.

4 **B. YouTube Attempts to Undermine its Negotiations with BayTSP**

5 Without providing any justification, YouTube now urges this Court to compel  
6 BayTSP to produce documents responsive to the original scope of its subpoena (Mot. at.  
7 15:23-24). This result would wholly ignore negotiations over approximately seven  
8 months – negotiations in which YouTube participated fully. As set forth above,  
9 YouTube and BayTSP engaged in extensive discussions regarding the scope of  
10 YouTube's subpoena. YouTube and BayTSP's mutual assent to the negotiated scope is  
11 evident in each company's decision to continue toward production of responsive  
12 documents under the narrowed subpoena. Indeed, rather than filing a motion to quash  
13 YouTube's subpoena, BayTSP turned its efforts toward collecting data and collaborating  
14 with YouTube to create a search term list. Similarly, YouTube, rather than filing a  
15 motion to compel at that time, engaged in reviewing BayTSP's search terms, albeit  
16 argumentatively.

17 Surprisingly, YouTube's motion omits its extensive negotiations with BayTSP.  
18 In order to argue that YouTube is entitled the entire original scope of its unduly  
19 burdensome subpoena, YouTube's motion entirely glosses over YouTube's and  
20 BayTSP's seven month negotiations (*See* Mot. at 15). YouTube instead chooses to  
21 emphasize its purported need for BayTSP's documents – a need that is questionable at  
22 best given YouTube's involvement in negotiations and periodic delays of up to two  
23 months in responding to BayTSP during these negotiations. In fact, YouTube dropped its  
24 threats of a motion to compel related to electronic searching in June, apparently satisfied  
25 with BayTSP's efforts toward production of this sizable volume of documents (Baum  
26 Decl., ¶17; Ex. N). YouTube cannot now claim BayTSP has stonewalled it and this  
27 alleged refusal somehow entitles YouTube to overly-broad discovery when the facts  
28 clearly show that BayTSP has worked diligently in good faith to produce responsive

1 documents.

2 Finally, allowing YouTube to undermine its more than half-year-long negotiations  
3 with BayTSP will violate notions of fundamental fairness to a third party. BayTSP has  
4 spent 1900 hours undertaking extensive efforts to produce documents responsive to the  
5 negotiated scope of YouTube's (Hemminger Decl., ¶63). This scope was agreed to by  
6 YouTube as sufficient to provide the documents it purports to need. To allow YouTube  
7 to violate its own agreement would cause BayTSP, a third-party to the litigation, to incur  
8 even greater expense for no just cause.

9 **C. BayTSP's Use of Search Terms is Entirely Appropriate**

10 In addition to reverting to the original scope of its subpoena, YouTube challenges  
11 BayTSP's use of search terms to identify responsive, relevant documents. BayTSP has  
12 searched over a million of documents using a list of thousands of targeted search terms  
13 (Hemminger Decl., ¶¶56, 66). As set forth above, YouTube was granted ample  
14 opportunity to contribute to this list, and the list ultimately searched includes several  
15 terms suggested by YouTube.

16 "Employment of search terms is a reasonable means of narrowing the production  
17 in this instance." *In re CV Therapeutics, Inc. Securities Lit.*, 2006 WL 2458720 \*2 (N.D.  
18 Cal. 2006). In *CV Therapeutics*, this Court allowed the application of search terms to  
19 125,000 in order to identify responsive documents. *Id.* Here the potential burden to  
20 nonparty BayTSP is much greater. BayTSP has already applied the thousand-plus list  
21 negotiated to millions of documents and has identified over half a million documents for  
22 production (Hemminger Decl., ¶¶56, 67-70; Exs. V-Y). Moreover, "[t]o the extent  
23 Plaintiff contests the adequacy of the search terms, it has not set forth an alternative  
24 search methodology . . . ." *In re CV Therapeutics, Inc. Securities Lit.*, 2006 WL 2458720  
25 \*2 (N.D. Cal. 2006). While YouTube now contests BayTSP's use of search terms, it fails  
26 to provide any reasonable alternative compliant with Rule 45. In light of BayTSP's  
27 extraordinary efforts and YouTube's failure to act reasonably, there can be little doubt  
28 that BayTSP's use of search terms is entirely appropriate.

1 **D. Substantial Harm Would Result from Compelling BayTSP to Comply with**  
2 **YouTube's Original Subpoena**

3 As set forth above, BayTSP, having negotiated a reasonable subpoena scope and  
4 search terms with YouTube, has invested considerable resources toward production. To  
5 compel BayTSP to now return to YouTube's original unduly burdensome requests  
6 without the assistance of search terms would result in at least the following harm.

7 *First*, YouTube's original broad requests do not account for third-party  
8 confidentiality of documents. *See* Section I.B. *supra*. The vast majority of documents  
9 responsive to these requests do not relate to Viacom's suit with YouTube and are  
10 therefore irrelevant to this litigation (*see* Hemminger Decl., ¶58). Moreover, these  
11 documents are subject to confidentiality agreements requiring that BayTSP contact all  
12 clients whose data would be released in response to YouTube's requests (*id.*, ¶29).  
13 Releasing this significant amount of data unrelated to this litigation would undoubtedly  
14 adversely impact BayTSP's business. BayTSP's clients will likely not continue their  
15 relationships with BayTSP for fear that if there is any future lawsuit, the clients'  
16 confidentiality will be compromised (*see id.*, ¶¶15, 17, 24). BayTSP would suffer this  
17 harm for no appreciable benefit to YouTube, as the documents YouTube seeks are  
18 irrelevant to this litigation. Explored a little more closely, YouTube is essentially asking  
19 the court to rule that it can serve a subpoena on any copyright owner to seek information  
20 about how they police their rights. The mere fact that BayTSP is hired as a copyright  
21 owners agent does not render the agreements between these clients and BayTSP relevant  
22 to Viacom's claims in the lawsuit. What YouTube should focus on is discovering  
23 Viacom's bases for its claims and addressing those claims -- not fishing from third  
24 parties.

25 *Second*, BayTSP has already completed its review and preparation of documents  
26 (*id.*, ¶70; Ex. Y). BayTSP properly undertook this review pursuant to Rule 502 of the  
27 Federal Rules of Evidence, which provides that inadvertent disclosure of privileged  
28 documents does not result in waiver if "the holder of the privilege took reasonable steps

1 to prevent disclosure.” Indeed, fully reviewing these documents for privilege contributed  
2 significantly to the amount of time needed to prepare these more than half-million  
3 documents for YouTube. Broadening the scope of BayTSP’s search at this late stage  
4 would only increase the number of irrelevant yet potentially privileged documents  
5 BayTSP would be forced to review in order to discharge its Rule 502 duty.

6 *Third*, YouTube would have this Court preclude BayTSP from applying search  
7 terms to BayTSP’s documents in order to identify a responsive subset. As set forth  
8 above, this process is entirely proper under this Court’s precedent and has been agreed to  
9 by YouTube. If this Court now requires BayTSP to cull through its entire universe of  
10 documents again without the use of the comprehensive search term list previously  
11 applied, BayTSP will be faced with individually reviewing four terabytes of data in order  
12 to respond to YouTube’s third-party subpoena (*see* Baum Decl., ¶17; Ex. N). A review  
13 of that magnitude would require in excess of six months and not result in the  
14 identification of documents not already available to YouTube (*see id.*).

#### 15 **E. YouTube’s Procedural Violations**

16 In addition to the foregoing, YouTube’s motion should be denied for violating  
17 Local Rule 37-1 and this Court’s Standing Order. YouTube attempts to circumvent the  
18 meet and confer requirement of Local Rule 37-1 by erroneously characterizing its  
19 negotiations and requests for information as conferences sufficient to satisfy the local rule  
20 (Mot. at 1). Further, at no point did YouTube confer with BayTSP with regard to its  
21 intent to file the present motion. As such and in addition to the reasons stated above, the  
22 Court should deny YouTube’s motion.

### 23 **III. THE COURT SHOULD REASONABLY LIMIT PRODUCTION**

24 YouTube improperly attempts to now undermine the negotiated scope of its  
25 subpoena. Further YouTube seeks to persuade this Court to compel third-party BayTSP  
26 to produce documents under undue burdens contrary to established precedent. In light of  
27 these tactics, BayTSP respectfully requests that this Court deny YouTube’s motion and  
28 Order the following:

1 (i) YouTube's subpoena *duces tecum* to BayTSP be limited to include only  
2 Plaintiffs and their subsidiaries;

3 (ii) YouTube's subpoena *duces tecum* to BayTSP be limited to exclude BayTSP's  
4 proprietary software and BayTSP's nonparty clients;

5 (iii) Production by making responsive documents available for YouTube's  
6 inspection on two computer terminals at Alston & Bird LLP's offices located at Two Palo  
7 Alto Square, 3000 El Camino Real, Suite 400, Palo Alto, CA., shall be sufficient;

8 (iv) Documents responsive to the limited scope allowed by this Order shall be  
9 made available for inspection on a rolling-basis terminating two weeks after the totality  
10 of responsive non-privileged documents has been made available;

11 (v) Inadvertent production documents protected under the attorney-client  
12 privilege, work-product protection, or any other applicable privilege or protection,  
13 despite reasonable efforts to prescreen such documents prior to production, will not  
14 waive the applicable privilege or protection, and YouTube will return such inadvertently  
15 produced Discovery Material promptly after learning of its inadvertent production; and

16 (vi) Should YouTube indicate it seeks copies of documents made available for  
17 inspection, electronic and paper copies such documents shall be provided to YouTube at  
18 you YouTube's expense.

19  
20  
21 Dated: November 18, 2008

Respectfully Submitted,

22  
23 /s/ Steven D. Hemminger  
24 Steven D. Hemminger  
25 ALSTON & BIRD, LLP

26 Attorneys for Nonparty  
27 BayTSP.com, Inc.  
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